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No. 86-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

L & L MARINE SERVICE, INC.,
Petitioner,

v.

THE INSURANCE COMPANY
OF NORTH AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit properly affirmed Respondent's jury verdict based on the express and unambiguous language of a marine time hull insurance policy which excluded coverage for Petitioner's loss caused by its failure to exercise due diligence to maintain its vessel in a seaworthy condition?

2. Whether the Eighth Circuit properly affirmed Respondent's jury verdict based on *Union Insurance Co.* v. *Smith*, 124 U.S. 405 (1888), and the well entrenched rule of American maritime law that the implied warranty of seaworthiness in a marine time hull insurance policy excluded coverage for Petitioner's loss caused by its failure to exercise due diligence to maintain its vessel in a seaworthy condition?

RULE 28.1 LISTING

CIGNA Corporation

CIGNA Holdings, Inc.

CIGNA Worldwide, Inc.

CIGNA Affiliated Business Group, Inc.

CIGNA Insurance Company

CIGNA International Holding, Ltd.

CIGNA Investment Group, Inc.

Connecticut General Corporation

Connecticut General Insurance Corporation

Aetna Insurance Company

INA Corporation

INA Financial Corporation

INA Reinsurance Company

INA Life of New York

Life Insurance Company of North America

INA Properties, Inc.

INA of Texas, Inc.

INA Employers Insurance Company

INA Insurance Company of Illinois

INA Insurance Company of Ohio

Aetna Fire Underwriters Insurance Company

Aetna Insurance Company of the Midwest

Aetna Reinsurance Company

American Lloyds Insurance Company
Century Indemnity Company
Pacific Employers Insurance Company
Illinois Union Insurance Company
Bankers Standard Insurance Company
Alaska Pacific Assurance Company
Allied Insurance Company
Atlantic Employers Insurance Company
California Union Insurance Company
Horace Mann Insurance Company
Morton Life Insurance Company

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, The Insurance Company of North America, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

STATEMENT OF THE CASE

This case involves a factual dispute concerning the application of the language of a specialized insurance contract, a marine time hull policy ("policy"). Respondent, The Insurance Company of North America ("INA"), pro-

vided coverage to Petitioner, L & L Marine Service, Inc. ("L & L"), for L & L's Barge P-2 ("P-2"), a steel hopper barge built in 1957.

The insurance policy expressly excluded coverage for losses caused by L & L's failure to exercise due diligence to maintain its vessel in a seaworthy condition after the attachment of the policy. The term of policy was for a one year period commencing on December 1, 1982.

On December 16, 1982, the P-2 capsized near Pensacola, Florida. L & L filed a claim with INA for the value of the vessel. INA denied the claim based on the express language of the insurance policy, which excluded coverage for a loss caused by L & L's failure to maintain the P-2 in a seaworthy condition.

In December, 1983, L & L filed a lawsuit against INA to recover its insurance claim for its loss of the P-2. After an eight day trial, the district court instructed the jury to decide the central factual issue of whether L & L's failure to exercise to due diligence caused the P-2 to capsize and sink. The jury returned a verdict in favor of INA.

Substantial evidence supported the jury's verdict. Indeed, the evidence presented by both parties' witnesses demonstrated that L & L's officers and managing agents knew that the P-2's rusty and deteriorated condition caused the vessel to leak severely on every voyage for two years preceding its demise.

During 1981 and 1982, the P-2 made eight voyages to L & L's facility in Puerto Rico. On each of these voyages, Pierre St. Cyr, L & L's managing agent in Puerto Rico, discovered significant leaks in the hull of the vessel which caused flooding and deterioration. Tr. I:94-108. St. Cyr documented these problems and promptly advised L & L's management. Tr. I:65, 94.

L & L attempted to make temporary repairs on the barge to rectify the problems caused by the P-2's numerous cracks and leaks. One typical incident occurred in December, 1982, shortly before the P-2's last voyage. David Brunner, L & L's Vice President, personally made a temporary repair by driving a wooden plug into a hole in the hull to stop a leak. Tr. II:115. Brunner testified that he directed various officers to make permanent repairs to the barge before it embarked on its last voyage from Pensacola, Florida. Tr. I:141; II:153-55; III:10. L & L's Vice President of Engineering testified that, in spite of Mr. Brunner's order, he only made temporary repairs to the vessel before sending it to sea on its final voyage. Tr. III: 97-98.

During the second day of its final voyage, the P-2 began listing heavily to port. Tr. III:142-43. The captain of the P-2's towboat, an L & L employee, reported the condition to L & L's Pensacola office. The P-2's captain, L & L's Port Captain and officers mutually decided to continue the voyage. Tr. I:157-58. The P-2 capsized twenty-four hours later even though no unusual weather conditions had been encountered on the voyage. Tr. I:157-58; III:152,216.

Jack Oldani, L & L's Vice-President, and other L & L investigators inspected the capsized barge on December 21, 1982. Vice-President Brunner testified that the L & L officers' "concensus opinion" was that the vessel capsized as a result of leaks caused by the rusted and deteriorated hull. Tr. II:162. L & L's expert witness, John Colletti, testified that his examinations of a segment of the hull revealed that the hull's rusted condition was caused by L & L's failure to perform preventive maintenance on the P-2 for ten to fifteen years. Tr. IV:101; Def. Ex. SSSSSS. After hearing this evidence, the jury returned a verdict

for INA based upon its finding that the P-2 sunk as a result of L & L's lack of due diligence in maintaining the vessel in a seaworthy condition.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Use Its Limited and Valuable Resources to Review the Eighth Circuit's Opinion Interpreting the Plain Language of INA's Marine Time Hull Insurance Policy.

A. In Affirming the District Court's Judgment and INA's Jury Verdict, the Eighth Circuit Properly Relied on the Unambiguous Language of the Insurance Policy and *Union Insurance Co.* v. *Smith*, 124 U.S. 405 (1888).

INA's insurance policy which covered L & L's Barge P-2 contained a seaworthiness clause which provided:

> This Company [INA] shall not be liable for any loss, damage, or expense arising out of the failure of the Assured [L & L] to exercise due diligence to maintain the Vessel in a seaworthy condition after attachment of this Policy; the foregoing, however, not to be deemed a waiver of any warranty of seaworthiness implied at law.
>
> *L & L Marine Service, Inc.* v. *The Insurance Co. of North America*, 796 F.2d 1032, 1033 (8th Cir. 1986); Appendix to Petition for Writ of Certiorari ("A") at A-2.

This clause required INA to prove that L & L failed to exercise due diligence to maintain the P-2 and that this failure caused the vessel to capsize and sink. The liability instruction which the district court tendered to the jury had nearly the identical language to that which is contained in the insurance policy's seaworthiness exclusion. 796 F.2d at 1034, n.2; A-5.

The insurance policy's seaworthiness exclusion also expressly retained INA's right to assert implied warranties at law. These "implied" warranties are distinct from the policy's "express" provision which excluded coverage if L & L's loss was caused by its failure to exercise due diligence to maintain the P-2 after the attachment of the policy.

The Eighth Circuit recognized INA's alternative theories of defense under the insurance policy's seaworthiness exclusion clause and the implied warranty of seaworthiness. Accordingly, the court held, "*in light of the plain language of the clause in the insurance policy,* the Supreme Court's statement in *Union Insurance*, and the views of the Second Circuit and the New York Court of Appeals, we conclude that the District Court did not err in instructing the jury that a vessel owner who acts negligently fails to exercise due diligence." 796 F.2d at 1036; A-9 (emphasis added).

The Eighth Circuit's holding is directly supported by this Court's decision in *Union Insurance Co.* v. *Smith*, 124 U.S. 405 (1888). The case involved the interpretation of a marine time hull insurance policy which contained a seaworthiness exclusion clause that remarkably resembles the clause at issue in the case at bar.

The policy in *Union Insurance* provided that the insurer would not be liable for "all . . . losses . . . arising from or caused by the following or other legally excluded causes . . . incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel . . . rottenness, inherent defects and all other unseaworthiness." *Id.* at 407. Based on this language, the trial court instructed the jury that the insurance company should not be liable if the insured negligently failed to

repair a leak on its vessel which caused the vessel to sink. *Id.* at 412-13. This Court affirmed the trial court's instructions based on "the terms of the policy." *Id.* at 426-27.

The *Union Insurance* Court extended its holding beyond the seaworthiness exclusion clause of the insurance policy. The Court recognized that every marine time hull insurance policy contains an implied warranty of seaworthiness. Under this warranty,

> [a] defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith *or* want of ordinary prudence *or* diligence on the part of the insured or his agents discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence . . . . *Id.* at 427 (emphasis added).

Relying on *Union Insurance*, the Eighth Circuit affirmed the district court's jury instructions which contained a negligence standard based on the plain language of the insurance policy and, alternatively, on the implied warranty of seaworthiness. 796 F.2d at 1036; A-9.

B. The Eighth Circuit's Opinion Does Not Conflict With the Opinions of the Fifth Circuit.

L & L erroneously contends that the Eighth Circuit's holding conflicts with *Insurance Co. of North America* v. *John J. Bordlee Contractors, Inc.*, 532 F. Supp. 774 (E.D. La. 1982), *aff'd sub nom. Insurance Co. of North America* v. *Board of Commissioners*, 733 F.2d 1161 (5th Cir. 1984). *Board of Commissioners* involved a dispute in which INA denied coverage under a marine time hull insurance policy for the insured's loss of its pushboat, M/V MR. PETE, which sank when it collided with a tankship.

After reviewing the evidence presented at a trial without a jury, the district court found that the collision was

caused by the negligent navigation of each boat. 532 F. Supp. at 781-83. In addition, the court found that the insured's failure to hire licensed personnel for its pushboat was a contributing cause of the collision. *Id.* at 783.

To determine whether INA's policy provided coverage for the insured, the district court interpreted the identical seaworthiness exclusion clause which is at issue in L & L's insurance policy. The court held that "the clause constituted an exclusion or limitation on coverage which would support a denial of liability in the event that the loss or damage be caused proximately by the failure of the assured to use due diligence to maintain the vessel in a seaworthy condition." 532 F. Supp at 784. The court found that "the facts herein compel the conclusion that Mr. Bordlee's neglect rendered the MR. PETE unseaworthy within the meaning of the policy exclusion." *Id.* Applying these facts to the negligence standard embodied in the seaworthiness exclusion clause, the court held that the insured was not entitled to coverage. *Id.* at 785.

The Fifth Circuit affirmed the district court's finding that the insured's negligent hiring practices rendered the vessel unseaworthy. 733 F.2d at 1166. Thus, like the Eighth Circuit in the case at bar, the district court and the Fifth Circuit enforced the negligence standard contained in the express language in INA's seaworthiness exclusion clause.

L & L also erroneously contends that Eighth Circuit's opinion conflicts with *Saskatchewan Government Insurance Office* v. *Spot Pack, Inc.*, 242 F.2d 385 (5th Cir. 1957); *Tropical Marine Products, Inc.* v. *Birmingham Fire Insurance Co. of Pennsylvania*, 247 F.2d 116 (5th Cir.), *cert. denied*, 355 U.S. 903 (1957); *Lemar Towing Co.* v. *Fireman's Fund Insurance Co.*, 352 F. Supp. 652 (E.D.

La. 1972), *aff'd*, 471 F.2d 609 (5th Cir.), *cert. denied*, 414 U.S. 976 (1973); *D.J. McDuffie, Inc.* v. *Old Reliable Fire Insurance Co.*, 1979 A.M.C. 595 (E.D. La. 1977), *aff'd*, 608 F.2d 145 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980); and *Gregoire* v. *Underwriters at Lloyds, Combined Companies*, 559 F. Supp. 596 (D. Alaska 1982). These cases are inapposite as their holdings are not based on marine time hull policies which contain a seaworthiness exclusion clause. Moreover, three of these cases suggest that the parties would be contractually bound by a negligence standard contained in a seaworthiness exclusion clause which resembles the clause in *Union Insurance* or L & L's insurance policy. *Spot Pack*, 242 F.2d 385, 389; *Tropical Marine Products*, 247 F.2d at 123; *Gregoire*, 559 F. Supp. at 600. A fourth case held that the implied warranty of seaworthiness voids an insurance policy if the insured vessel is unseaworthy when the policy commences. *D.J. McDuffie, Inc.*, 1979 A.M.C. at 599-600. The fifth case applied a negligence standard in finding the insured was not entitled to coverage for its failure to maintain a competent crew on its vessel. *Lemar Towing*, 352 F.Supp. at 665.

C. The Eighth Circuit's Opinion Does Not Conflict With English Law.

The validity of provisions in marine time hull insurance policies which exclude coverage caused by the insured's failure to exercise due diligence is well established under English law. The Marine Insurance Act of 1906 provides:

> The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but *unless the policy otherwise provides*, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

> 6 Edw. 7 c. 41, § 55(2)(a)(1) *quoted in* 2 *Arnould's Law of Marine Insurance and Average* 599 (16th ed. 1981) (emphasis added) (hereinafter "Arnould's").

The statutory phrase, "unless the policy otherwise provides," recognizes the right of the parties to exclude coverage of loss caused by the insured's negligent conduct. Arnould's at 600; *Global Tankers Inc.* v. *Amercoat Europa N.V.*, 1 Lloyd's Rep. 66 (1977), cited in Arnould's at 603, n.27a. Accordingly, English law would enforce the express provision in INA's policy with L & L which excluded coverage for L & L's loss caused by its failure to exercise due diligence.

L & L's erroneous claim that English law would conflict with the Eight Circuit's opinion arises from L & L's exclusive focus on the provisions in English statutory law concerning implied warranties of seaworthiness. Marine Insurance Act of 1906, § 39, quoted in Arnould's at 547. These provisions are distinct from the English law, discussed above, concerning the enforcement of express provisions in the insurance policy. Marine Insurance Act of 1906, § 55, quoted in Arnould's at 599. The Eighth Circuit properly rejected L & L's strategy, which is based on its effort to negate the plain language of its insurance policy with INA. 796 F.2d at 1036; A-9.

II. The Eighth Circuit Correctly Determined That L & L Breached the Insurance Policy's Implied Warranty of Seaworthiness Based on the Well Settled American Rule That an Insurer Is Not Liable for a Loss Caused by the Insured's Failure to Exercise Due Diligence.

INA expressly stated in its insurance policy with L & L that its seaworthiness exclusion clause shall "not . . . be deemed a waiver of any warranty of seaworthiness implied at law." 796 F.2d at 1033; A-3. The Eighth Circuit correctly determined that the American Rule concerning

the implied warranty of seaworthiness in a marine time hull policy excluded coverage for an insured's loss caused by its own negligence. 796 F.2d at 1035, 1036, n.6; A-6 to A-8. Accordingly, the court based its affirmance of the jury's verdict on alternative grounds: the plain language of INA's seaworthiness exclusion clause as well as L & L's breach of the warranty of seaworthiness implied at law. 796 F.2d at 1036; A-9.

The American rule concerning the implied duty of seaworthiness has been well entrenched in this country's jurisprudence since the nineteenth century. *Union Insurance Co.* v. *Smith*, 124 U.S. 405, 427 (1888); 2 Parsons, *Maritime Law* 147-48 (1859) (the insured has an implied duty at law to maintain the seaworthiness of its vessel at every port "so far as that is reasonably possible, under the penalty of discharging the insurers in case a loss occurs by reason of an unseaworthiness which could have been repaired by the use of proper means.").

Numerous federal and state courts have applied the American rule. *See, e.g., New York & Puerto Rico Steamship Co.* v. *Aetna Insurance Co.*, 204 F. 255, 258 (2d cir. 1913); *Seaman* v. *Enterprise Fire & Marine Insurance Co.*, 21 F. 778, 780-81 (C.C. Mo. 1884) ("as a matter of law, whether expressed or not in the policy, there is an obligation on the part of the boat—the owners of a boat—to see that when she leaves the port of departure she is seaworthy . . . ."); *King* v. *Liverpool & London & Globe Insurance Co.*, 238 N.Y.S.2d 799, 801-02 (N.Y. Sup. Ct. 1964). ("A defect of seaworthiness, which arises after the commencement of the risk and is permitted to continue from want of ordinary prudence and diligence on the part of the owner or his agents, discharges the insurer from liability for any loss which results from such want of prudence or diligence.").

L & L argues that the Eighth Circuit improperly relied on *Union Insurance* to establish a negligence standard for the implied warranty of seaworthiness. It maintains that the holding of *Union Insurance* was based on the language of the insurance policy, which contained an express seaworthiness exclusion clause. L & L fails to realize that the *Union Insurance* Court's affirmance of the jury's application of a negligence standard was alternatively based on the implied warranty of seaworthiness.

L & L also unfairly criticizes the Eighth Circuit for creating a conflict with the Fifth Circuit. A close reading of the Fifth Circuit case interpreting the implied warranty of seaworthiness reveals that they apply either a negligence standard or one of several different standards. *See, e.g., Insurance Co. of North America* v. *John J. Bordlee Contractors, Inc.*, 532 F. Supp. 774, 784 (E.D. La. 1982), *aff'd sub nom. Insurance Co. of North America* v. *Board of Commissioners*, 733 F.2d 1161, 1165-66 (5th Cir. 1984) (finding breach of implied warranty whether standard is due diligence or knowledge or bad faith or neglect); *Saskatchewan Government Insurance Office* v. *Spot Pack, Inc.*, 242 F.2d 385, 388 (5th Cir. 1957) (characterizing the American rule "in the negative that the Owner, from bad faith *or* neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.") (emphasis added); *Lemar Towing Co.* v. *Fireman's Fund Insurance Co.*, 352 F. Supp. 652, 665 (E.D. La. 1972) (applying negligence standard to find breach of implied warranty). *Cf. Gregoire* v. *Underwriters at Lloyds, Combined Companies*, 559 F. Supp. 596, 599 (D. Alaska 1982) (commenting on the contradictory holdings of the Fifth Circuit cases).

The Fifth Circuit, not this Court, ought to resolve the confusion which has been generated by the opinions

within its own circuit. Notwithstanding this confusion, the Eighth Circuit's opinion does not create a conflict in the circuits and, to the contrary, is soundly based on well established precedents.

Even if one accepted L & L's argument that the implied warranty of seaworthiness excludes coverage only if L & L knew that its vessel was unseaworthy, an overwhelming amount of evidence, presented by both parties' witnesses, proved that L & L's officers and managing agents knew that the P-2 was unseaworthy prior to its sinking. *See* Respondent's "Statement of the Case," *supra*. Accordingly, even if one assumes that a knowledge standard applies and that the district court improperly used a negligence standard to instruct the jury, the error was harmless. Moreover, L & L's argument that a pure knowledge standard applies is undermined by the ambiguous and contradictory proposed jury instruction it tendered to the district court which stated that "the Defendant must show that Plaintiff from bad faith and neglect knowingly permitted the vessel to break ground." 796 F.2d at 1034 n.3; A-5.

III. Substantial Policy Considerations Support the Eighth Circuit's Opinion Enforcing the Parties' Written Contractual Agreement and Excluding Insurance Coverage If an Insured Fails to Exercise Due Diligence to Maintain the Seaworthiness of Its Vessel.

Substantial policy considerations support the Eighth Circuit's opinion. INA and L & L, two sophisticated corporations, agreed to an insurance policy which expressly excluded coverage for a loss caused by L & L's lack of due diligence in maintaining its vessels. The district court and the Eighth Circuit properly enforced the parties' bargain and expectations embodied in their contractual agreement. If this Court accepted L & L's argument, which

negates the express terms of its insurance policy, marine insurance policy holders would have an incentive to challenge in court the validity of numerous provisions in their policies. Endless litigation would ensue, which would restrict the availability of reasonable insurance coverage within the maritime industry.

If this Court accepted L & L's argument that it should not be held responsible for its own lack of due diligence, vessel owners throughout the world would be encouraged to abandon prudent maintenance and safety procedures, creating the frightening possibility of significant loss of life and property. Furthermore, vessels owners, rather than insurers, are in a better position to control and ascertain if their vessels are unseaworthy when they leave ports around the world. Public policy considerations support the requirement that owners should constantly inspect their vessels and make adequate repairs before sending their vessels to sea.

The Eighth Circuit properly affirmed the jury's verdict and judgment of the District Court based on the express exclusionary language contained in INA's insurance policy and the longstanding American rule concerning the implied warranty of seaworthiness in a marine time hull policy, which excludes coverage for a loss caused by the insured's failure to exercise due diligence to maintain its vessels.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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